APPENDIX A
Examples of Declined Exemptions Involving Rule 6(2) of the Code

1 General Information

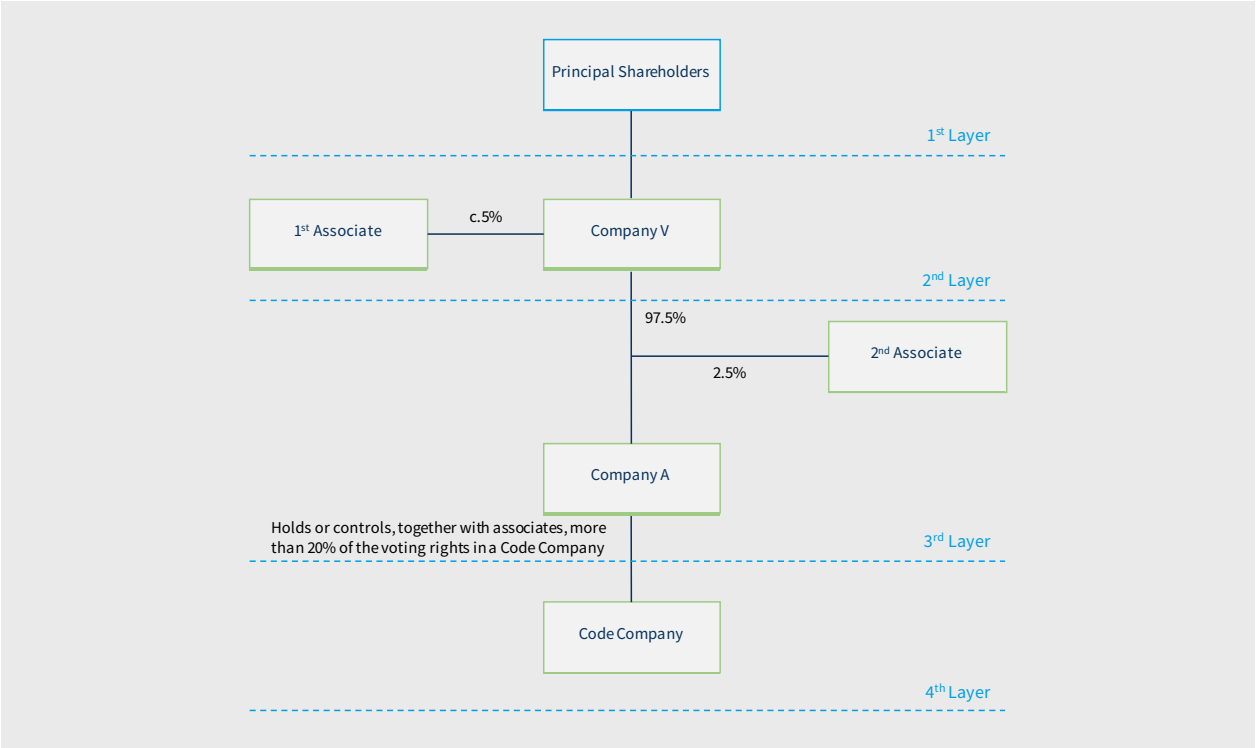
1.1 This part of the Guidance Note describes two applications for exemptions that were declined by the Panel on the basis that the relevant transactions involved did not infringe a deeming rule in rule 6(2) of the Code and therefore could be put into effect without the need for an exemption from the fundamental rule. The applications are illustrative of the Panel's interpretation of rule 6(2).

1.2 The names of the parties involved have been omitted to protect commercial confidentiality.

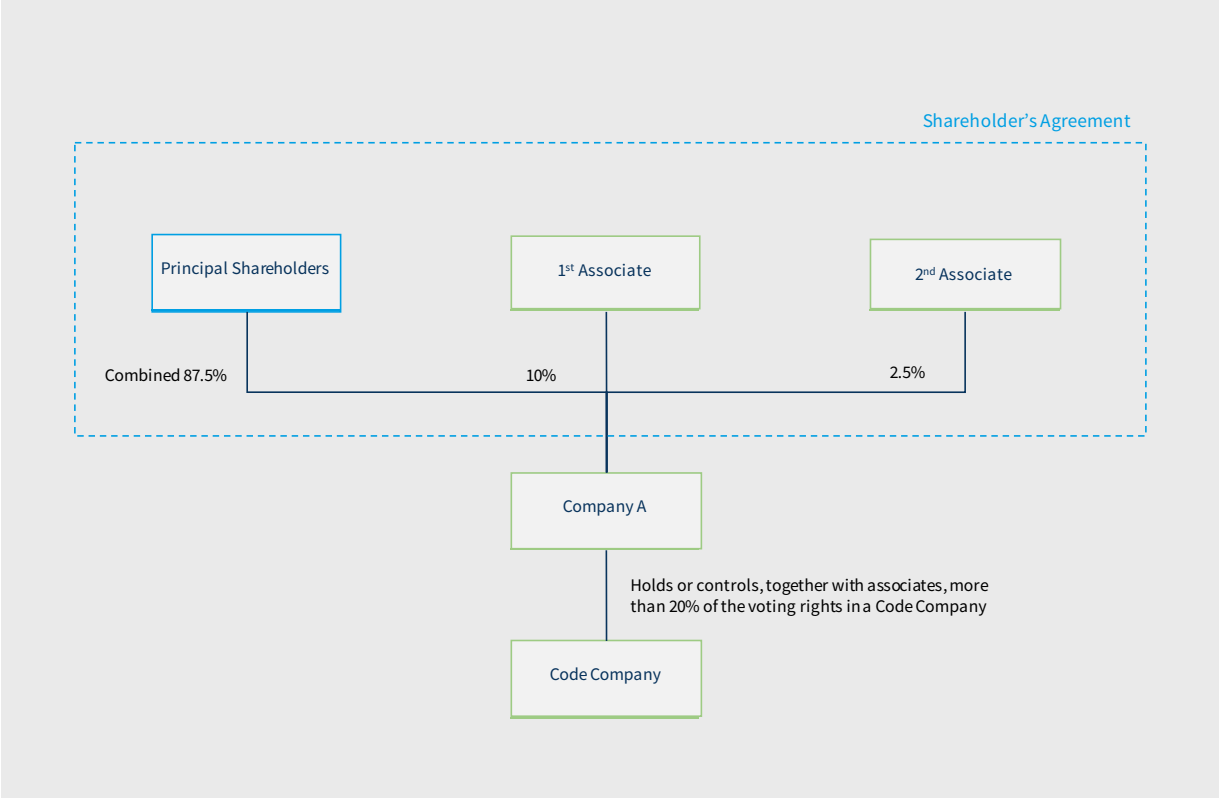
2 Restructuring of family investment structure – rule 6(2)(b) – joining in control as associates

2.1 The diagrams below illustrate the transaction:

Example 1:
Pre-restructure



Post-Restructure



3 Background

3.1 The family's investment interest in the Code company was structured into four layers. The first layer essentially comprised separate entities which operated for the benefit of family members (the **Principal Shareholders**).

3.2 The Principal Shareholders held approximately 95% of the shares in an investment holding company, Company V (the second layer). The remaining 5% of the shares were held by an associate of the family (the **First Associate**). Company V held a range of different investments interests.

3.3 One of those interests was a 97.5% holding in Company A (the third layer). The remaining shares in Company A were held by another associate who was connected to the family (the **Second Associate**). Company A held or controlled, together with its associates, more than 20% of the voting rights in a Code company.

3.4 This structure effectively gave the Principal Shareholders control of more than 20% of the voting rights in the Code company.

4 Proposed restructuring

4.1 The family wished to simplify the structure. The proposed restructuring involved Company V disposing of its 97.5% interest in Company A to the Principal Shareholders and the First Associate. As a result, the Principal Shareholders would hold a combined 87.5% of the shares in Company A, the First Associate would hold 10% and the Second Associate would continue to hold 2.5%. The shareholders of Company A would then enter into a shareholders' agreement whereby (among other things):

(a) the director of Company A would be nominated by the Principal Shareholders; and

(b) Company A could not enter into significant transactions without the approval of the Principal Shareholders.

5 The Panel's decision

5.1 The Principal Shareholders sought an exemption from rule 6(1) of the Code to allow the restructuring without obtaining the approval of the shareholders of the Code company.

5.2 The Panel noted that the proposed restructuring was not going to result in the Principal Shareholders increasing the percentage of voting rights that they already controlled in the Code company. The issue for the Panel was whether the First Associate, by becoming a 10% shareholder in Company A, would be deemed by rule 6(2)(b) of the Code to increase its voting control in the Code Company above 20%.

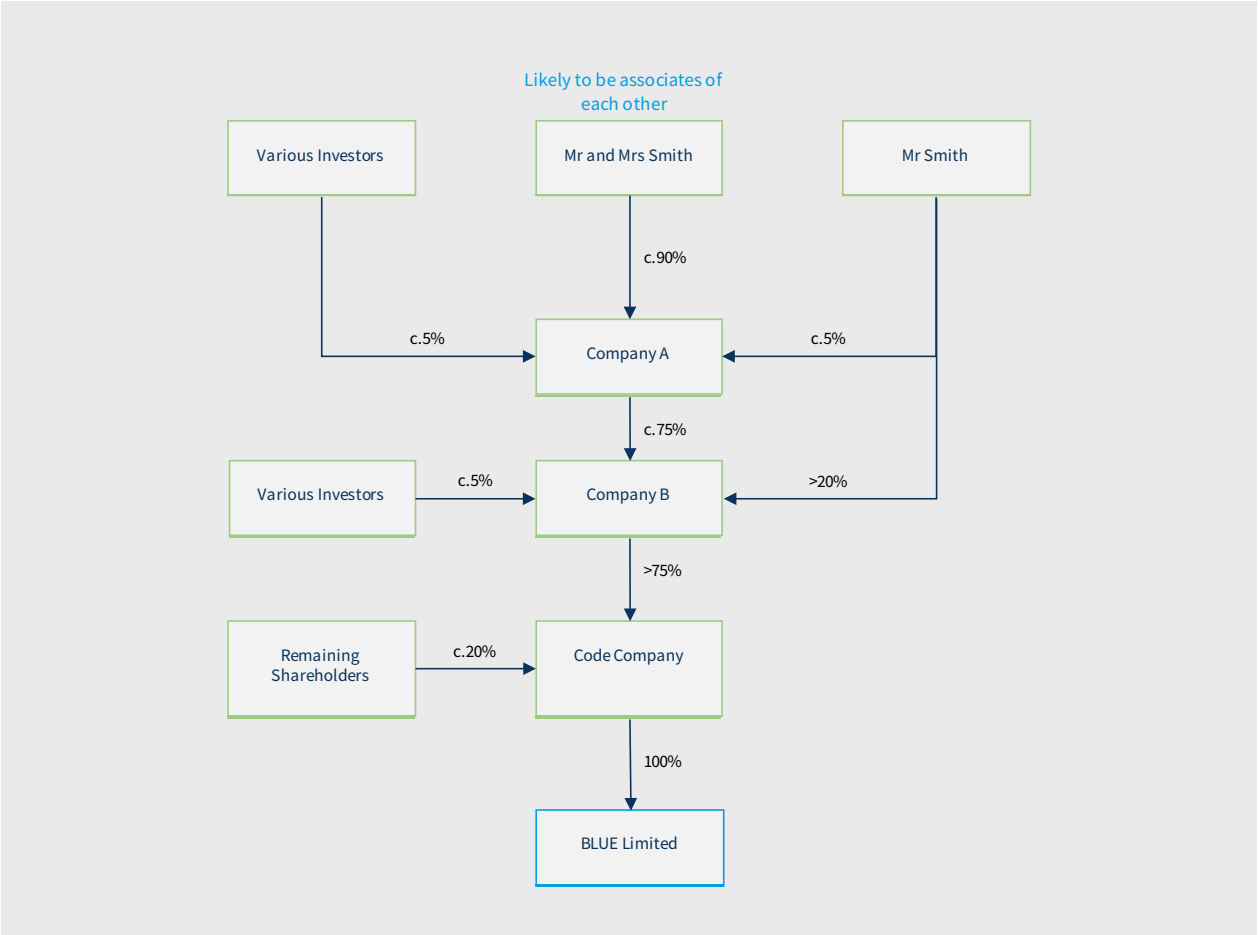
5.3 Rule 6(2)(b) provides that if "*a person or persons together hold or control voting rights and another person joins that person or all or any of those persons in the holding or controlling of those voting rights as associates, the other person is deemed to have become the holder or controller of those voting rights*". The key consideration for the Panel was whether the First Associate was going *to join* the Principal Shareholders *in the control* of voting rights held by them in the Code Company. The Panel concluded that First Associate would not do so because of the shareholding agreement that was going to be put in place. Accordingly, rule 6(2)(b) did not apply.

5.4 Given that no persons involved in the proposed restructuring transaction were going to be caught by the Code, the Panel declined to grant the application for an exemption, on the basis that no exemption was necessary.

6 Proposed merger – rule 6(2)(c) – upstream companies

6.1 The second example relates to proposed merger of two upstream companies. This is depicted below in Example 2.

Example 2:
Post-Merger



Background

6.2 Mr and Mrs Smith jointly held 90% of the shares in Company A. Mr Smith, held in his own name 5% of the shares, and the remaining shareholders of Company A were various other investors, all of whom were likely to have been associates of the Smiths for the purposes of the Code.

6.3 Company A held approximately 75% of the shares in another company, Company B. Mr Smith held 20% of the shares in Company B and the remaining shares were held by various investors. Mr Smith and these investors were all likely to have been associates of Company A and of the Smiths for the purposes of the Code.

Proposed transactions

6.4 Company B held all the shares in Blue Limited. It was proposed that Company B would merge with a Code company (the **Merger**). The proposed transaction would involve Company B selling all of its shares in Blue to the Code company and the Code company issuing shares to Company B as consideration for the shares in Blue. Company B would also subscribe for additional shares in Code company. It was expected that after the Merger, Company B would hold more than 75% of the Code company and that the remaining shareholders of the Code company would hold more than 20%.

6.5 Company A was also proposing to make an unrelated business acquisition (the **Proposed Acquisition**) following the Merger. To assist completion of this transaction, the Smiths intended to make a financial contribution into Company A which would result in the Smiths increasing their ownership of Company A by less than 1%.

6.6 Company A and Company B, the Smiths (together) and Mr Smith (together the "Applicants") were concerned that the Proposed Acquisition, and any potential future share transactions in Company A and Company B, would be caught by rule 6(1) of the Code. An exemption was sought from rule 6(1) in respect of the Proposed Acquisition so that the applicants could obtain certainty as to the application of rule 6(1) in the particular circumstances. The Applicants requested that the Panel decline the exemption on the express basis that the Code was not applicable to the circumstances.

6.7 The Applicants submitted that despite the Proposed Acquisition (or any other similar future transaction) the Smiths already controlled Company A and the less than 1% increase in the Smiths' shareholding in Company A would have no impact on the Smiths' effective control of the Code company if the Merger proceeded.

The Panel's decision

6.8 Rule 6(2)(c) appeared to be the only rule that may have applied to the proposed transactions. Rule 6(2)(c) provides that if "*voting rights are held or controlled by a person together with associates, any increase in the extent to which that person shares in the holding or controlling of those voting rights with associates is deemed to be an increase in the percentage of the voting rights held or controlled by that person*".

6.9 The issue in question was whether, as a result of the shareholding arrangements relating to Company A and Company B, the Smiths and the other investors would be regarded as sharing in the control of the voting rights in the Code company following the Merger. It was accepted by the Applicants that the Smiths and the other investors were likely to be associates of each other for the purposes of the Code.

6.10 If the Smiths and the other investors would be regarded as sharing in the control of the voting rights in the Code company, rule 6(2)(c) would apply to the proposed transactions, and would have the effect of preventing any of the shareholders in Company A and Company B from increasing their voting rights in Company A or Company B (except in accordance with the Code). This is because an acquisition of voting rights in Company A or Company B would result in the acquirer of those voting rights increasing the extent to which they shared in control of the voting rights in the Code company. Rule 6(2)(c) would deem that increase to be an increase in the acquirer's voting control in the Code company. That increase would be caught by the Code.

6.11 The Panel noted that there were no shareholder agreements in place in respect of Company A and Company B and that the shareholders in those companies only had their statutory rights as shareholders. Given the structure of Company A and Company B, the Panel considered that the Smiths had complete and unfettered control over Company A and likewise, Company A and the Smiths (together) had absolute control over Company B. Once the Merger was complete, the Smiths would, in turn, control the voting rights held by Company B in the Code company. Furthermore, the Panel considered that the minority shareholders in the upstream companies (Company A and Company B) did not appear to have any share in the control of the voting rights of those upstream companies, and therefore the Smiths would not share control of the voting rights in the Code company with those minority shareholders as contemplated by rule 6(2)(c) of the Code.

6.12 For these reasons, the Panel declined the application for an exemption on the basis that the Code did not apply so no exemption was necessary.